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Case No. 90-1673

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1990

COLUMBIA OLDSMOBILE, INC.,

*Petitioner,*

v.

CITY OF MONTGOMERY, OHIO,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of Ohio**

## RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:
JOHN C. NORWINE
City of Montgomery,
Law Director
8050 Hosbrook, Suite 200
Cincinnati, OH 45236
(513) 891-1530

MARK I. WALLACH
Counsel of Record
JOHN E. GOTHERMAN
SMITH R. BRITTINGHAM IV
CALFEE, HALTER & GRISWOLD
1800 Society Building
Cleveland, OH 44114-2688
(216) 622-8200

*Attorneys for Respondent*
*The City of Montgomery*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## CONSTITUTIONAL PROVISIONS

Ohio Constitution, Article XVIII, Section 3 provides as follows:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

## STATEMENT OF THE CASE

Petitioner, Columbia Oldsmobile, Inc. ("Columbia"), has set forth an adequate description of the procedural posture of this case which requires only minor elaboration. Columbia's claim throughout this lawsuit has been, until very recently, that "defendant's [Montgomery's] zoning ordinance, which limits land owned by the plaintiff to residential development, is unreasonable, arbitrary, confiscatory and, therefore, unconstitutional as applied to said land." Judgment Entry, Court of Common Pleas, Hamilton County, Ohio, Case No. A-8604419, reprinted in the Appendix to Columbia's Petition for Writ of Certiorari (hereinafter referred to as "Appendix"), at 26a. In fact, the Common Pleas Court noted that "[t]he sole issue to be decided in this case is the constitutionality of the Residence "A" zoning as applied to the rear 11.5 acres of plaintiff's property." Appendix at 27a. As Columbia correctly notes, the Common Pleas Court entered judgment in favor of Montgomery, stating that "[Columbia] has failed to sustain its burden of proving that the existing zoning is unreasonable, arbitrary, and confiscatory beyond fair debate, and bears no rational relationship to

the health, safety and welfare of the citizens and of Montgomery." Appendix at 34a.

The Court of Appeals for the First Appellate District of Ohio considered the same issue, that is, the constitutionality of the zoning ordinance as applied to Columbia's property. The Court of Appeals came to the opposite conclusion, finding that "the 'A' residential zoning classification is unconstitutionally applied to Columbia's property." Decision, Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio, Appeal No. C-870741, reprinted in the Appendix at 25a.

Finally, on appeal to the Ohio Supreme Court, the same issue was again addressed:

> This case presents the question of whether a trial court must uphold a municipal zoning ordinance when there is competent, credible evidence that the ordinance allows the landowners to retain an economically viable use of their land and that the ordinance substantially advances a legitimate governmental interest in the health, safety or welfare of the community. We answer this question in the affirmative.

*Columbia Oldsmobile, Inc. v. Montgomery*, 56 Ohio St. 3d 60, 62, 564 N.E.2d 455, 457 (1990), reprinted in the Appendix at 4a. The Ohio Supreme Court found that the ordinance did indeed allow Columbia an economically feasible use of its property and that Montgomery's comprehensive zoning ordinance, as applied to Columbia's property, substantially advanced Montgomery's legitimate interest in the health, safety, and welfare of the community. Appendix at 12a. That finding has not been appealed by Columbia.

As Columbia admits in its Petition for Writ of Certiorari to the Supreme Court of Ohio, the so-called "federal constitutional issue" now claimed to justify this Court's attention – that Montgomery purportedly failed to follow its own resolution allegedly requiring zoning decisions to be made pursuant to a comprehensive plan – was not raised by Columbia until it filed its Motion for Rehearing with the Ohio Supreme Court, which motion was denied. Petition for Writ of Certiorari to the Supreme Court of Ohio (hereinafter "Petition") at 2. In fact, the resolution now at issue played no part in the decisions of the three state courts which have previously considered this case; the Supreme Court of Ohio mentioned its existence briefly, *see* Appendix at 9a, while the Court of Appeals and the Court of Common Pleas apparently considered the resolution to be so irrelevant as not even to warrant acknowledgement.

## ARGUMENT

### I. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE FACTS OF THIS CASE.

Perhaps the most compelling reason that this Court should choose not to review the decision of the Supreme Court of Ohio is that the question Columbia would have this Court decide simply does not arise from the facts of this case. Columbia proposes the following question for this Court's review:

> Whether a municipal corporation *that adopts a policy that zoning decisions be made in accordance with a comprehensive plan* but does not utilize a comprehensive plan in denying a landowner's

> application for a zone change violates the Fifth and Fourteenth Amendments to the United States Constitution.

Petition at 7 (emphasis added). As the factual basis for this question, Columbia points to language in Resolution No. 35-1982, passed by the Montgomery City Council on August 4, 1982. Columbia claims that this Resolution constituted a "commitment to enact and follow" a comprehensive zoning plan. Petition at 12. However, a cursory review of the Resolution quickly refutes that claim. The Resolution "directs the City Manager to undertake *the preparation* of a Comprehensive Community Plan for the City of Montgomery that will identify the City's major needs and desirable improvements." (Emphasis added). The Resolution also specifies that the City Manager should work closely with the Planning Commission, and that the Commission "shall make the final submission to the City Council on or before the first Council Meeting in April 1983." Finally, the Resolution permits the City Manager to "expand upon the directions afforded in this Resolution according to his judgment and discretion."

The clear and unambiguous language of the Resolution merely directs the City Manager to *prepare* a Comprehensive Community Plan for later possible consideration by the Council. Nothing in the Resolution obligates the Council to *adopt* a Comprehensive Community Plan, or to make all zoning decisions pursuant to a Comprehensive Community Plan. In addition, the Resolution requires the City Manager and the Planning Commission to "make the final submission to the City Council," presumably so that

City Council can review the Plan to determine whether or not to adopt it. It is clear that the Resolution is merely the first step in City Council's overall consideration of the appropriateness of a comprehensive community plan.[1]

Throughout the Petition, Columbia exaggerates the effect of the Resolution and its relevance to Columbia's cause of action. Columbia claims that:

> once the City of Montgomery obligated itself to base future zoning decisions upon such a master plan, Montgomery was obligated, by its own ordinance, to do so. The City made a compact with its citizens which it did not keep.

Petition at 8. Montgomery merely passed a resolution, not an ordinance as Columbia states. Under Ohio law, a resolution is generally the proper procedure for informal enactments providing for the disposition of a particular item of business. Ordinances are usually reserved for the enactment of a regulation of a general or permanent nature. *Wuebker v. Hopkins*, 29 Ohio App. 386, 388, 163 N.E. 566 (Ohio Ct. App. 1928); *State, ex rel. City of Mansfield, v. Lowrey*, 3 Ohio Misc. 174, 177, 210 N.E.2d 751 (Richland Com. Pleas Ct. 1964). *See also* 5 McQuillin, *Municipal Corporations*, § 15.02 at 55 (3d ed. 1991):

> [I]t may be observed that a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force

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[1] As Columbia is forced to admit, the Ohio Supreme Court held that "there is no statutory requirement [in Ohio] that cities such as Montgomery enact a comprehensive community plan pursuant to its power to zone. . . . " Appendix at 10a.

> until the ordinance is repealed. An ordinance is distinctively a legislative act; a resolution, generally speaking, is simply an expression of opinion or mind or policy concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality.

(Citations omitted). While the name given to a particular City Council directive is not necessarily dispositive, the fact that City Council chose to enact a resolution rather than an ordinance reflects City Council's apparent belief that the directive in the Resolution was temporary and administrative in nature. The Montgomery City Council's action in directing the City Manager to prepare a comprehensive plan and submit it to the City Council for consideration is hardly a legislative act giving rise to a permanent rule of conduct or government. Rather it is a ministerial act relating to the administrative business of the municipality. Columbia's claim that the Resolution gives rise to a "compact with its citizens which [Montgomery] did not keep" is an overstatement of the nature of a resolution in general, and a significant misrepresentation of the specific Resolution at hand.

Because the facts of this case are not as Columbia represents, the case law cited by Columbia is irrelevant. In *Baker v. City of Milwaukie*, 271 Ore. 500, 533 P.2d 772 (1975), the Oregon Supreme Court was considering, as noted by Columbia, "the effect of the *adoption*, by a municipality, of a comprehensive plan on preexisting and conflicting zoning ordinances." Petition at 9, quoting

*Baker v. City of Milwaukie* (emphasis added). Since Montgomery has not *adopted* a comprehensive plan, the question of what effect the adoption of such a plan would have on Montgomery's preexisting zoning ordinances is not properly presented by Columbia's current appeal. Likewise, in *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (Cal. Dist. Ct. App. 1965), the court was considering whether the *adoption* of a comprehensive plan by a City Council should be subject to a referendum even though effectuated t rough a resolution. The court's positive response is again irrelevant since Montgomery has not *adopted* a comprehensive plan through any mechanism.

Columbia's entire brief rests on the assumption that Montgomery has actually obligated itself to zone in accordance with a comprehensive zoning plan. That assumption is incorrect. This Court should not accept this case for review because the facts of the case do not give rise to the legal issue Columbia proposes for the consideration of this Court.

## II. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE ACTUAL LAWSUIT FILED AND PURSUED BY COLUMBIA.

The question presented for review by Columbia is unrelated either to the lawsuit which Columbia originally brought or to the issues which were presented to the lower state courts. As noted in the Statement of the Case, above, Columbia brought a declaratory judgment action to determine the constitutionality of the Montgomery zoning ordinance which limited the use of Columbia's

property to residential development. Columbia argued before each of the state courts that the zoning ordinance denied Columbia the economically feasible use of its property without furthering a legitimate interest in the health, safety and welfare of the community. The trial court and the Ohio Supreme Court found otherwise, and upheld the constitutionality of the Montgomery comprehensive zoning ordinance.

Throughout the state court proceedings the issue of the lack of a comprehensive plan arose tangentially as part of the inquiry into the relationship between the zoning classification and Montgomery's legitimate interest in the health, safety and welfare of the community. However, the supposed nexus between the absence of a comprehensive plan and Resolution 35-1982 played no role at all in the lower court decisions. One can scour the assorted state court opinions and find only one reference to Resolution 35-1982 – the Ohio Supreme Court listed the Resolution as one factor which indicated that the zoning "was based on established community standards, objectives, and goals, and was rationally related to the public health, safety and welfare." Appendix at 9a. Columbia itself did not raise the issue it now champions until its Motion for Rehearing before the Ohio Supreme Court, which motion was denied. The issue of whether Montgomery's City Council followed a resolution passed in 1982 directing a city official to prepare a comprehensive plan so that the Council might consider its adoption simply has no relationship to the inquiry presented to the courts below by Columbia's lawsuit: whether the current Montgomery zoning, originally applied to Columbia's property in 1967, was constitutional.

## III. THE QUESTION PRESENTED INVOLVES ONLY ISSUES OF MUNICIPAL POWER UNDER STATE LAW, AND DOES NOT IMPLICATE FEDERAL CONSTITUTIONAL RIGHTS.

Even if Columbia's articulation of the facts underlying the question presented were accurate – that Montgomery obligated itself to adopt a comprehensive plan – and even if the question presented belonged in this lawsuit, it would not require this Court's review since it raises only state law issues. Columbia's question presented arguably raises the issues of whether Resolution 35-1982 expired in April 1983 when the City Manager and the Planning Commission did not make final submission of the plan to City Council, and whether City Council was permitted to overrule the effect of Resolution 35-1982 implicitly. Columbia's argument also attempts to raise the issue of whether a municipality is required to zone in accordance with an adopted comprehensive plan. However, each of these issues can and should be resolved by reference to Ohio law; no federal constitutional rights are implicated by Montgomery's action or, in this case, inaction.

As a general matter, Montgomery's municipal powers are defined by Ohio law. Ohio municipalities have the "authority to exercise all powers of local self-government. . . . " Ohio Constitution, Article XVIII, Section 3. Under Article XVIII, Section 3, a municipality may propose and adopt a charter and exercise all powers of local self-government pursuant to that charter. Montgomery has enacted a charter, and that charter includes provisions setting forth the municipality's legislative and administrative powers and the initiative, referendum and

recall powers reserved to the people of Montgomery. The overall scope of Montgomery's municipal power and the specific effect of Resolution 35-1982 is dictated by the Montgomery charter and the Ohio Constitution. In particular, the answer to the question of whether the Resolution retains any lingering effect after the City Manager and the Planning Commission failed to prepare and submit a comprehensive plan to the City Council within the time specified by the Resolution is controlled by state law concepts, not federal constitutional law.

Ohio common law is also the determining factor in deciding whether the City Council is permitted to ignore its prior directive to the City Manager to prepare a comprehensive plan. Generally, Ohio law permits Ohio municipalities to reconsider their actions until a final determination is made. While the Montgomery City Council did indeed pass Resolution 35-1982, it subsequently made zoning decisions, prepared and considered a community survey, and formulated guidelines for development in the Montgomery Road Corridor, apparently without waiting for the comprehensive plan to be prepared. Appendix at 9a-10a. These actions suggest that the City Council implicitly reconsidered its prior decision to consider the adoption of a comprehensive zoning plan.[2] Ohio law determines whether such a reconsideration was permissible.

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[2] As a practical matter, the Montgomery City Council may well have determined that a comprehensive plan was unnecessary given the comprehensive nature of Montgomery's zoning ordinance. The Ohio Supreme Court noted that "there was

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Finally, Ohio law dictates whether Montgomery would be required to zone in accordance with a comprehensive zoning plan if it were to adopt such a plan. The Ohio Supreme Court has explicitly stated that no requirement exists which compels an Ohio municipality such as Montgomery to adopt a comprehensive plan. Appendix at 10a. The fact that Ohio litigants apparently have not raised the question of what effect the adoption of a comprehensive plan would have on a municipality's zoning decisions supports the generally accepted view that plans are advisory only and are not regulatory. Plans often constitute mere recommendations or projections of administrative staff or consultants, but do not impose regulations. Columbia relies in part on *Baker v. City of Milwaukie, supra,* to support its claim that Montgomery would be required to make all zoning decisions in conformity with the comprehensive zoning plan which Montgomery supposedly obligated itself to adopt. In *Baker v. City of Milwaukie,* the Oregon Supreme Court, after examining the legislative history of the applicable Oregon statutes, ruled that once a comprehensive plan had been adopted by a municipality, the municipality

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competent, credible evidence demonstrating Montgomery's extensive planning schemes." Appendix at 10a. In his concurring opinion, Ohio Supreme Court Justice Herbert Brown stated that "a well-drafted zoning ordinance can, by itself, constitute the 'comprehensive plan.' " Appendix at 13a (citations omitted). Justice Brown would have held that "Montgomery has enacted zoning legislation in accordance with a comprehensive plan. . . . " Appendix at 13a. Thus, the City Council may have decided that a comprehensive plan would have been needlessly cumulative.

must conform its preexisting zoning ordinances to the plan.[3]

Other state courts have come to different conclusions, however, holding that, even after the adoption of some sort of comprehensive land use plan, zoning decisions need not be made in strict conformity with that plan. For example, in *Montgomery v. Bremer County Board of Supervisors*, 299 N.W.2d 687 (Iowa 1980), the Supreme Court of Iowa upheld a rezoning decision, which by statute was required to be made in accordance with a comprehensive plan, even though it did not comply with the current comprehensive plan. Several state courts have held that comprehensive plans are merely advisory and need not be followed strictly. *See, e.g., Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wash. 2d 201, 212, 634 P.2d 853, 860 (1981) (en banc) ("Nonconformance with a comprehensive plan does not necessarily render the [rezoning] action illegal. The plan is only a general blueprint and thus only general conformance is necessary." (citations omitted)); *Hoffman v. Brevard County Board of Commissioners*, 390 So. 2d 445, 446 (Fla. Dist. Ct. App. 1980) ("However, the plan, being merely a set of guidelines, does not rigidly bind the Board of County Commissioners in zoning decisions."); *State, by Rochester Association of Neighborhoods v. City of Rochester*, 268

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[3] Columbia's position is actually a significant extension of the decision in *Baker v. City of Milwaukie*. While the court in *Baker v. City of Milwaukie* held that a municipality must conform preexisting zoning ordinances to a subsequently adopted comprehensive plan, Columbia essentially argues that once the decision to *prepare* a plan has been made, the preexisting zoning ordinances are invalid even before the plan has been formulated and adopted.

N.W.2d 885, 890 (Minn. 1978) (en banc) ("The statute in fact does not require even that the zoning ordinance conform exactly to the city's land-use plan."); *Todrin v. Board of Supervisors of Charlestown Township*, 27 Pa. Commw. 583, 367 A.2d 332 (Pa. Commw. Ct. 1976); *Stones v. Plattsmouth Airport Authority*, 193 Neb. 552, 228 N.W.2d 129 (1975); *Chrinko v. South Brunswick Township Planning Board*, 77 N.J. Super. 594, 187 A.2d 221 (N.J. Super. Ct. Law Div. 1963); *see generally* 8 McQuillin, *Municipal Corporations*, § 25.78 at 287 (3d ed. 1991).

As a general matter, there is considerable debate over what is a "comprehensive plan." *See, e.g.*, Annot., 40 A.L.R.3d 372 § 3 (1971), and cases cited therein. Plans are often thought of as voluminous advisory studies, usually of a technical nature, prepared by professional planners to be used as a reference in preparing more detailed ordinances. In contrast, as stated earlier, one Justice of the Ohio Supreme Court would have held that Montgomery's comprehensive zoning ordinance itself constituted a "comprehensive plan." Appendix at 13a. The exact nature of a comprehensive plan, and the general effect of a municipality's adoption of such a plan, depends on the peculiar zoning policy of each state. Accordingly, whether Montgomery would be required to zone in strict conformance with any comprehensive plan it might adopt is an issue of Ohio law with which this Court need not concern itself.

## CONCLUSION

Columbia brought this action in an attempt to have Montgomery's Residential A zoning classification held unconstitutional as applied to Columbia's property. After

travelling through the state courts of Ohio, Columbia's efforts eventually failed, and the Ohio Supreme Court upheld the constitutionality of Montgomery's comprehensive zoning ordinance. Apparently realizing that its primary argument had failed to win the day, Columbia attempted to manufacture a federal constitutional issue in order to gain this Court's attention. Unfortunately, Columbia has built its castle on a bed of sand. Neither the facts of this case nor the previous legal arguments raised by Columbia and considered by the lower courts give rise to the allegedly unique federal issue Columbia proposes for review by this Court. Resolution of the question presented by Columbia merely requires an analysis of state law issues.

Because Columbia's appeal does not raise issues requiring this Court's review, the Petition for Writ of Certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

MARK I. WALLACH
Counsel of Record
JOHN E. GOTHERMAN
SMITH R. BRITTINGHAM IV
CALFEE, HALTER & GRISWOLD
1800 Society Building
Cleveland, OH 44114-2688
(216) 622-8200

*Attorneys for Respondent,*
*The City of Montgomery*

Of Counsel:

JOHN C. NORWINE
City Of Montgomery, Director of Law
8050 Hosbrook, Suite 200
Cincinnati, OH 45236
(513) 891-1530